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Supreme Court, U.S.
FILED
NOV 26 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-393

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

JAMES B. STANLEY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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1. a. Respondent argues (Br. in Opp. 10-11), contrary to our claim that the time to appeal from the dismissal of his FTCA claims has long passed (Pet. 9-10), that no final judgment of dismissal was entered properly. Petitioner contends that the district court's dismissal of his FTCA claims in 1982 was ineffective because no separate judgment in favor of the United States was entered pursuant to Fed. R. Civ. P. 58 and 79(a).

There is no merit to respondent's claim that the district court failed to enter a proper final judgment. The district court wrote a lengthy memorandum (Pet. App. 56a-66a) on October 15, 1982, that concluded that respondent's FTCA claims should be dismissed. On November 9, 1982, the court entered a final judgment order (*id.* at 54a-55a) granting the United States' motion for partial final judgment pursuant to Fed. R. Civ. P. 54(b). That separate order fully complied with the requirements of Rule 58. See *Beaudry Motor Co.* v. *Abko Properties, Inc.*, 780 F.2d 751, 753-755 (9th Cir. 1986).[1]

[1] This case is therefore different than cases where a memorandum and order are entered as a single document. Cf. *Amoco Oil Co.* v. *Jim Heiling Oil & Gas, Inc.*, No. 85-2107

Respondent contends (Br. in Opp. 10) that the order of November 9, 1982, is deficient because it provides that "the clerk shall enter final judgment in favor of the United States"; respondent apparently contends that the order should have read "final judgment is entered in favor of the United States." There is no substance to this hyper-technical argument. The entry in the docket provided that partial final judgment had been entered in favor of the United States (Br. in Opp. App. A4). Moreover, respondent understood that the court had dismissed the United States. In a letter to the district court on June 21, 1983, respondent's counsel stated that "[l]ast October you wrote a detailed order * * * wherein you dismissed the Plaintiff's FTCA claim against the U.S. Government due to the *Feres* doctrine" (App., *infra*, 2a). The court of appeals also understood that the FTCA claims had been dismissed. It noted that "[u]pon motion by the government, on November 9, 1982, the district court entered final judgment in favor of the government" (Pet. App. 5a).

(Nov. 17, 1986) (Blackmun & O'Connor, JJ., dissenting from denial of certiorari). As the advisory committee notes state, one purpose of Rule 58 was to clarify that, in addition to a memorandum opinion containing "some apparently directive or dispositive words," a separate order must be entered (28 U.S.C. App. at 627-628). Here, in addition to the opinion issued on October 15, 1982 (Pet. App. 56a-66a), the court entered a separate order on November 9, 1982 (*id.* at 54a-55a).

Furthermore, the requirements of Rule 58 are expressly "[s]ubject to the provisions of Rule 54(b)." All that should be required to start the time for filing a notice of appeal in a case involving a partial final judgment is compliance with Rule 54(b). A central purpose of Rule 54(b) certification is to provide a certain starting point for conducting an appeal from an otherwise interlocutory order. Certification itself thus serves the function served by the "separate document" requirement of Rule 58.

The clerk entered the final judgment on the civil docket, as required by Rule 79(a), on November 10, 1982. The entry states: "Motion for Partial Final Judgment by Deft., USA is Granted" (Br. in Opp. App. A4). That entry fully complied with the requirements of Rule 79(a). See *Beaudry*, 780 F.2d at 755. Accordingly, under Fed. R. App. P. 4(a)(1) the time to appeal expired in January 1983.[2]

In any event, respondent has not responded to our argument (Pet. 10) that the court of appeals lacked jurisdiction over the FTCA claims because this case was before the court on an interlocutory appeal pursuant to 28 U.S.C. 1292(b) to consider the district court's refusal to dismiss respondent's *Bivens* claims. As the court of appeals noted (Pet. App. 6a), the basis of its jurisdiction was its grant of the individual defendants' motion for interlocutory appeal to review the district court's order of October 28, 1983, where the court refused to dismiss the *Bivens* claims. On an interlocutory appeal, "the scope of the issues open to the court of appeals is closely limited to the order appealed from" and does not extend to "matters ruled upon in other orders" (16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* 143 (1977)); *Pritchard-Keang Nam Corp.* v. *Jaworski*, 751 F.2d 277, 280-281 n.3 (8th Cir. 1984), cert. dismissed, 472 U.S. 1022 (1985); *United States* v. *Bear Marine Services*, 696 F.2d 1117, 1118-1119 n.1 (5th Cir. 1983).

Accordingly, it was clear error to review the November 9, 1982, dismissal of the FTCA claims on an

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[2] Respondent states (Br. in Opp. 9-10) that no notice of entry of judgment was mailed by the clerk to the parties as required by Fed. R. Civ. P. 77(d). Even if this assertion is correct, such a failure would be irrelevant since Rule 77(d) expressly provides that "[l]ack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed."

interlocutory appeal from the October 28, 1983, order refusing to dismiss the *Bivens* claims. This error is egregious since the United States was not even a party to the interlocutory appeal and the FTCA issue was not briefed. Thus, even if respondent's time to appeal the November 9, 1982, order dismissing the United States had not run, the court of appeals lacked jurisdiction over his FTCA claims. The court of appeals' sua sponte assertion of jurisdiction over the FTCA claims on an interlocutory appeal challenging the district court's refusal to dismiss the *Bivens* claims has so far departed from the accepted course of judicial proceedings to warrant an exercise of this Court's supervisory jurisdiction.[3]

b. We also showed in our petition (at 10-13) that the court of appeals erred in holding that controlling precedent does not "preclude Stanley's lawsuit under the FTCA * * * upon a finding that he suffered the complained of injury while performing duties incident to military activities" (Pet. App. 19a). Respondent asserts (Br. in Opp. 12-13) that his injuries were not incurred incident to military service because, at the time he was given LSD, he had been released from his regular duty status and "had complete control over his movements" (*id.* at 13). The Fifth Circuit rejected that argument when it considered this case in 1981 (Pet. App. 72a-74a), and the court of appeals did not dispute that holding in

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[3] Respondent asserts (Br. in Opp. 11) that he would be able to obtain relief under Fed. R. Civ. P. 60(b). However, we know of no authority—and respondent cites none—authorizing a court of appeals to reopen a final judgment more than three years after it was entered because (as the court of appeals incorrectly concluded (Pet. App. 17a)) controlling authority had changed in the interim. Moreover, such a rule would obviously prevent parties from ever knowing with any certainty that a case had been resolved. Such a holding would also completely bypass the district court and its role in adjudicating Rule 60(b) motions.

concluding that respondent's FTCA claims are not necessarily barred (see *id.* at 16a). There is simply no merit to petitioner's assertion that he was not injured incident to service because he was, by his own agreement, in a unique duty status.[4]

Since we filed our petition, this Court granted certiorari in *United States* v. *Johnson*, No. 85-2039, to decide whether a service member injured incident to service may pursue FTCA claims alleging negligence on the part of civilian federal employees. As we argued in our brief in *Johnson*,[5] this Court has consistently held that a service member's claims under the FTCA are barred if they were incurred incident to military service. Indeed, the court in *Johnson* acknowledged that claims based on injuries incurred incident to military service are barred where the alleged tortfeasor, like those here, was a "member of the armed forces or a civilian employee engaged in activities usually associated with the armed forces" (85-2039 Pet. App. 25a). The court of appeals' contrary holding in this case warrants reversal.[6]

2. As we also showed in our petition (at 14-18), the court of appeals clearly erred in permitting re-

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[4] While arguing that his duty status at the time involved substantial freedom of action on his part, so that a trial in this case would not impact adversely on military discipline (Br. in Opp. 12-13), respondent emphasizes that he was not a true volunteer because his consent was obtained by fraud (*id.* at 2, 12). In arguing that a trial in this case would not "require a civilian court to second-guess the wisdom of military decisions" (*id.* at 13), respondent is obviously incorrect. The central issue in a trial in this case would be whether the military erred in deciding to use Army volunteers in conducting chemical warfare tests in the late 1950s.

[5] We have furnished a copy of our brief in *Johnson* to counsel for respondent.

[6] If this case is not disposed of summarily (see pages 9-10, *infra*), the Court should either review the FTCA question (Question 1) or hold it for disposition in light of *Johnson*.

spondent to go forward with his *Bivens* claims since this Court held in *Chappell* v. *Wallace*, 462 U.S. 296, 305 (1983), that "enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations." Respondent erroneously asserts (Br. in Opp. 15) that this case is distinguishable from *Chappell* because he is not suing "superior officers." The basis for the decision in *Chappell* was that " '[o]rderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters' " (462 U.S. at 301, quoting *Orloff* v. *Willoughby*, 345 U.S. 83, 94 (1953)). Respondent's amended complaint alleges that the individual federal defendants "were acting under color of a covert army program * * * which was implemented by the United States Government, the Central Intelligence Agency, the United States Department of Defense and the U.S. Army" (¶ 20). Clearly, as respondent alleges in his complaint, he was administered LSD as part of an official Army drug experimentation program. That program was developed and administered by respondent's superiors, and it is their decisions that he challenges. This Court barred the plaintiffs in *Chappell* from going forward with *Bivens* claims to prevent civilian courts from reviewing just the sort of challenges to military decisions that respondent seeks to raise here.[7]

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[7] The Court also based its holding in *Chappell* on the fact that Congress had provided alternative avenues by which service members could obtain relief. We noted in our petition (at 17-18) that Congress had provided that persons such as respondent could obtain veterans' benefits if they suffered injury incident to service. Respondent complains (Br. in Opp. 21) that he has not obtained disability benefits under the Veterans' Benefits Act, and suggests (*id.* at 19 n.9) that we concede that the Act does not provide him with a remedy. These statements demonstrate misunderstanding of the Act

There is no merit to respondent's assertion (Br. in Opp. 16-17) that the decision below does not conflict with decisions of other circuits. The court in *Mollnow* v. *Carlton*, 716 F.2d 627, 630 (9th Cir. 1983), cert. denied, 465 U.S. 1100 (1984), held that "the Court [in *Chappell*] necessarily imposed a *per se* prohibition on the filing of *Bivens*-type actions by servicemen against their superiors." Respondent states (Br. in Opp. 16) that the district court distinguished *Mollnow* at Pet. App. 32a-33a; however, the district court did not cite the *Mollnow* decision. Respondent also suggests that the Ninth Circuit "seemed to take a different view of *Chappell*" (Br. in Opp. 16) in *Gonzalez* v. *Department of the Army*, 718 F.2d 926, 929 (1983). That assertion is also wrong; indeed, *Gonzales* did not involve a *Bivens* claim.[8] The decision here clearly conflicts with the decision in *Mollnow*.

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and our position. Respondent does not allege that he applied for veterans' disability benefits, and we are informed that he has not applied; of course, a person must apply in order to obtain benefits. 38 U.S.C. 3001(a). If respondent demonstrates that he suffers from a disability as a result of his ingestion of LSD in 1958, then he is entitled to compensation. 38 U.S.C. 331. Furthermore, as *Chappell* makes clear, it is not the adequacy of the remedy, but rather Congress's "activity in the field" (462 U.S. at 304), that constitutes the "special factor" which led this Court to conclude that a *Bivens* remedy is not available to military personnel for torts allegedly committed by their superior officers.

[8] The court held in *Gonzalez* that a service member could not bring a claim that he had been denied a promotion because of race discrimination against the Army and the Secretary of the Army under 42 U.S.C. 1981. The court explained that "the court would be required to scrutinize numerous personnel decisions by many individuals as they relate to appellant's claim that he was improperly denied promotion. This inquiry would involve the court in a very sensitive area of military expertise and discretion. While we would not shrink from such an assessment in a civilian setting, the same hesitation that precludes a *Bivens*-type claim in the military setting, *see Chappell* * * *, compels restraint here." 718 F.2d at 930.

The decision here also conflicts with the decisions in *Gaspard* v. *United States*, 713 F.2d 1097 (5th Cir. 1983), cert. denied, 466 U.S. 975 (1984), and *Jaffee* v. *United States*, 663 F.2d 1226 (3d Cir. 1981), cert. denied, 456 U.S. 972 (1982). Contrary to respondent's claim (Br. in Opp. 17), *Gaspard* and *Jaffee* are not distinguishable because they involved a direct order while this case did not. Nothing in this Court's decision in *Chappell* supports the conclusion that, in order to determine whether a service member may go forward with a *Bivens* action, a court should determine whether the claim revolves around some identifiable order that had been issued to the service member. Rather, the Court's decision was based on its conclusion that civilian courts are ill-equipped to review military orders of any type (see 462 U.S. at 301-302). As the Fifth Circuit stated in *Gaspard*, under *Chappell* a court is barred "from inquiring into monetary damages when a service person is injured" incident to service (713 F.2d at 1103).

The Third Circuit recently made its conflict with the decision here even more clear. That court stated, in concluding that the plaintiff there could not bring a claim against Pennsylvania National Guard officers under 42 U.S.C. 1983, that "the *Stanley* court misread *Chappell*." *Jorden* v. *National Guard Bureau*, 799 F.2d 99, 107 (1986). Contrary to the approach followed by the courts below, the Third Circuit stated that this Court's decision in *Chappell* "la[id] down a general rule barring damages actions by military personnel against superior officers for constitutional violations, rather than authorizing a fact-specific inquiry." *Id.* at 108. Accordingly, there is a clear conflict between the decision here and the decisions of other courts of appeals. Indeed, the courts below are the only courts that have not read *Chappell* to bar

Bivens actions by service members.[9] Unless this case is dealt with summarily (see pages 9-10, *infra*), the *Bivens* question (Question 2) warrants plenary review to resolve the conflict in the circuits.[10]

3. Respondent concludes (Br. in Opp. 23) that "further briefing would be repetitive" so that summary disposition of this case is appropriate under Rule 23.1 of the Rules of this Court. Since this Court will hear argument in *Johnson* on the question whether the *Feres* doctrine is applicable in an FTCA action alleging negligence on the part of civilian

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[9] Respondent states that the Eighth Circuit recently held in *Brown* v. *United States*, 739 F.2d 362 (1984), cert. denied, No. 84-636 (July 1, 1985), that a plaintiff could "bring a *Bivens* action even though an FTCA claim could not be prosecuted under the *Feres* doctrine" (Br. in Opp. 17-18). As an initial matter, *Brown* did not involve a *Bivens* claim; rather, the plaintiff sought to bring suit against his superior officers and fellow service members under 42 U.S.C. 1981 and 1983. Moreover, the analysis in that case supports our position rather than respondent's. The plaintiff's claim in *Brown* was that his fellow national guardsmen led him to believe "that he was being taken by a lynch mob" (739 F.2d at 364). The court held that the plaintiff could not pursue claims against superior officers alleging that they failed to prevent the incident and investigate it properly because those claims would involve second-guessing of military decisions (*id.* at 369). The court permitted the plaintiff to bring suit against the plaintiff's fellow guardsmen, however, concluding that "a racially tinged mock hanging of a fellow soldier * * * served no conceivable or remotely military purpose" (*id.* at 368). An analogous claim would be presented here if respondent claimed that fellow service members gave him LSD as a misguided prank rather than as part of an official Army program.

[10] Contrary to respondent's claim (Br. in Opp. 7-8), the interlocutory posture of this case provides no reason to forego review. A primary purpose underlying the *Feres* doctrine and the Court's refusal to permit *Bivens* suits is to avoid having civilian courts second-guess military decisions. *United States* v. *Shearer*, No. 84-194 (June 27, 1985), slip op. 6. Permitting a trial to go forward in this case would require just such second-guessing.

federal employees, in most circumstances the FTCA question (Question 1) would, at a minimum, be held for *Johnson*. However, because the court of appeals so clearly erred in reviving the FTCA issue which was not before it and which had been dismissed without appeal in 1982, we agree that summary action may be warranted on this issue.

We believe that the *Bivens* question (Question 2) is also sufficiently clear that the Court may wish to consider summary reversal. This Court clearly stated in *Chappell* that claims such as respondent's are barred: "We hold that enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations." 462 U.S. at 305. As we have shown, all of the courts other than the courts below have understood *Chappell* to bar claims such as respondent's.[11]

For the foregoing reasons and the additional reasons stated in the petition for a writ of certiorari, it is respectfully submitted that the petition for a writ of certiorari should be granted. The Court should either order briefing on the merits or vacate the court of appeals' decision and remand with instructions to dismiss respondent's complaint.

CHARLES FRIED
Solicitor General

NOVEMBER 1986

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[11] Even counsel for respondent believed at one point in this litigation that *Chappell* barred respondent's *Bivens* claims. He stated, in a letter to the district court shortly after the decision in *Chappell*, that "we are ethically compelled to cite to the court a recent Supreme Court decision which, we regret to say, is apparently dispositive of this case" (App., *infra*, 1a). Counsel went on to say that the Court in *Chappell* "held that the same principles which underly [*sic*] the *Feres* doctrine and which require absolute immunity from an FTCA action also require immunity from a *Bivens* constitutional action against federal officers" (*id.* at 2a).

APPENDIX

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June 21, 1983

Honorable Jose A. Gonzalez, Jr.
U.S. District Court Judge
Southern District of Florida
Federal Courthouse Building
299 East Broward Blvd.
Ft. Lauderdale, FL 33301

Re: Stanley v Bertino, et al, and Unknown
Individual Federal Agents and Officers

Dear Judge Gonzalez:

We feel we are ethically compelled to cite to the court a recent Supreme Court decision which, we regret to say, is apparently dispositive of this case. This is the case involving the former military serviceman who was suing the United States government and individual federal officers for secretly introducing LSD into his bloodstream during the course of a covert military drug experimentation program in the late 1950's.

Last October you wrote a detailed order which is now published; *Stanley v U.S.*, 549 F.Supp. 327 (S.D. Fla. 1982); wherein you dismissed the Plaintiff's FTCA claim against the U.S. Government due to the *Feres* doctrine; however, you held that our constitutional *Bivens* claim against individual federal officers was not barred by *Feres* and you declined to dismiss our *Bivens* claim. In upholding our *Bivens* claim you relied on and cited *Wallace v Chappell*, 661 F.2d 729 (9th Cir. 1981). You also denied Defendants' statute of limitations challenge to the *Bivens* claim.

Presently pending before this court is the Defendants' motion again raising statute of limitations arguments and also seeking dismissal on grounds of improper venue and lack of personal jurisdiction, and our response and alternative motion to transfer venue to Maryland. However, it now seems that all those issues may be moot because the Supreme Court has just reversed the *Wallace v Chappell* case which you relied on previously to uphold our *Bivens* claim.

We are enclosing a copy of the Supreme Court's opinion in *Chappell v Wallace* which was just filed last week and published in U.S. Law Weekly. Unfortunately the Supreme Court has just held that the same principles which underly the *Feres* doctrine and which require absolute immunity from an FTCA action also require immunity from a *Bivens* constitutional action against federal officers.

Since we argued to the contrary previously in reliance on the Ninth Circuit's opinion in *Wallace v Chappell*, before it was just reversed, and since you were persuaded to follow the Ninth Circuit and you published your order in Federal Supplement, we feel it is our obligation as officers of the Court to report

to you what has just happened to the *Wallace v Chappell* case in the Supreme Court. We do so with great regret because we feel what the government has done to Plaintiff and others like him is reprehensible, however, it unfortunately seems that we are not allowed to obtain redress in the civil courts.

We greatly appreciate the time and thoughtful consideration you have given to this case during the course of this litigation.

Respectfully yours,

/s/ Ward Wagner, Jr.
WARD WAGNER, JR.

WW/dc

Enclosure

cc: John L. Euler, Esq.
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J. Paul McGrath, Esq.
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